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In The

Supreme Court of the United States

October Term, 1995

ZEBULON ENTERPRISES, INC. and LARRY GANT,

Petitioners,

vs.

STATE OF ILLINOIS,

Respondent.

Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a warrant for the seizure of expressive materials violates the First, Fourth and Fourteenth Amendments, where it mandates the seizure of all magazines and videotapes depicting listed sexual activities, without naming or otherwise specifying those materials and with no prior judicial consideration of their probable obscenity.

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Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second District

PETITION FOR A WRIT OF CERTIORARI

Petitioners Zebulon Enterprises, Inc.,[1] and Larry Gant pray that this Court issue a Writ of Certiorari and review the judgment of the Appellate Court of Illinois in this case.

[1] Corporate Petitioner Zebulon Enterprises, Inc., has no parent companies or subsidiaries. All parties to this action appear in the caption of the case.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, Second District, is reproduced as Appendix A to this Petition.[2] The Illinois Supreme Court's unreported order denying leave to appeal to that court appears as Appendix B.

JURISDICTION

The Supreme Court of Illinois entered its order denying Petitioners leave to appeal on April 5, 1995. Petitioners have filed this Petition in compliance with Rule 13.1 of this Court.[3] Under 28 U.S.C. § 1257(a), this Court has jurisdiction to review the decision of the highest state court of Illinois.[4]

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment I

"Congress shall make no law . . . abridging the freedom of speech, or of the press."

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[2] In this unpublished decision, the court below relied entirely upon its own prior opinion in *People v. Sequoia Books, Inc.*, 145 Ill. App. 3d 1054, 495 N.E.2d 1292 (2nd Dist. 1986).

[3] As the 90th day following the contested judgment falls on a holiday, July 4, this Petition will be filed on or before July 5, 1995.

[4] Although the Illinois courts have not entered a judgment of conviction in this case, they have decided this federal question in a manner that undermines important constitutional policies under the First and Fourth Amendments. This Court's jurisdiction is therefore entirely appropriate under the final judgment rule, as discussed more fully below.

Amendment IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioners have been charged with violations of Illinois obscenity law,[5] exclusively on the basis of magazines and videotapes seized from the Zebulon Bookstore (an adult book and video store) pursuant to the challenged warrant. None of those seized materials were named or described in the application for the warrant or reviewed by the issuing magistrate, nor were they named in the warrant. Petitioners therefore contest the warrant as unconstitutionally overbroad, because it failed to specify any of the materials to be seized. Rather, the warrant

[5] Ill. Rev. Stat. Ch. 38, sec. 11-20(a)(1), under which Petitioners are charged, is an adult obscenity statute patterned on the standard prescribed in *Miller v. California*, 413 U.S. 15 (1973).

sweepingly required the executing officers to seize all materials depicting a near-exhaustive list of sexual activities, or at least those they deemed obscene at their own discretion.

Following police investigations of the Zebulon book and video store in September and October 1991, the investigators filed a search warrant application to which they attached three magazines they had purchased as evidence of probable obscenity. On that basis, the magistrate issued a warrant on October 16, 1991, broadly mandating the seizure of all magazines *and video cassette tapes*[6] containing depictions of any of a wide variety of sexual activities. (The warrant is reproduced below as Appendix C; the affidavit appears as Appendix D.) The magistrate had neither reviewed the large number of videotapes and magazines subsequently seized pursuant to this warrant, nor otherwise considered their probable obscenity.

Each Petitioner was charged in DuPage County, Illinois with two obscenity counts, solely on the basis of materials seized pursuant to the warrant but not specified in either the warrant or the application for it. Petitioners filed motions to quash the search warrant and to suppress the seized materials, on grounds that the warrant and the search violated the First and Fourth Amendments. The trial court agreed, holding the warrant impermissibly general on its face because "it allows an officer to search and seize whatever the officer determines to be obscene" (Appendix A at 4). In the trial judge's view, the warrant was so patently invalid on its face that there was no need to consider the scope of the actual search.

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[6] The judge who issued the warrant had never reviewed *any* videotapes from the Zebulon Bookstore.

The State appealed, and the Appellate Court of Illinois (Second District) reversed, relying exclusively on one of its own prior decisions, *People v. Sequoia Books, Inc.*, 145 Ill. App. 3d 1054, 495 N.E.2d 1292 (2nd Dist. 1986). In that case, the court had rejected the same challenge to a materially identical warrant to seize erotic materials. In the wake of *Sequoia Books*, such warrants then became commonplace in Illinois obscenity cases.

With scant reference to this Court's decisions, the Appellate Court held that the line of cases beginning with *Marcus v. Search Warrants of Property*, 367 U.S. 717 (1961), did not apply because " '[t]he purpose of the search in this case was not to suppress materials but was to obtain evidence of an alleged criminal offense.' " (Appendix A at 6, quoting *Sequoia Books*, 145 Ill. App. 3d at 1062, 495 N.E.2d at 1297).

> " 'The language of the search warrant here may initially appear to be general; however, when compared to the "general" warrants of the past, we conclude that the conduct intended to be prevented, that is the *ad hoc* determinations of obscenity by law-enforcement personnel suppressing first amendment rights, is accomplished by this search warrant because it is a search for evidence and a seizure of items depicting certain explicit sexual conduct which, by prior judicial determination, indicates a fair probability that they meet the three-prong obscenity test.' "

Appendix A at 7, *quoting id.* at 1062-1063, 495 N.E.2d at 1297-1298.

Petitioners sought review of this decision in the Supreme Court of Illinois, which denied their petition for leave to appeal on April 5, 1995 (Appendix B at 11).

REASONS FOR GRANTING THE WRIT

The warrant challenged in this case violates two bedrock principles which have always guided this Court's evaluation of warrants for the seizure of allegedly obscene materials. As this Court emphasized when it first decided that the First Amendment did not preclude criminal sanctions for obscenity, "sex and obscenity are not synonymous." *Roth v. United States*, 354 U.S. 476, 487 (1957). Accordingly, this Court has consistently held that any warrant for the seizure of media materials on grounds of probable obscenity must not issue unless the magistrate has conducted a review of those materials, "designed to focus searchingly on the question of obscenity." *Marcus v. Search Warrants of Property*, 367 U.S. 717, 732 (1961). In an unbroken line of cases, this Court has clearly rejected any notion that a warrant may issue, as it did in this case, for the seizure of unnamed and unspecified materials on grounds of probable obscenity.

In this case, however, the warrant required the blanket seizure of unnamed materials, a seizure limited only by the discretion of the police. The warrant mandated that the executing officers seize unnamed "[m]agazines and video cassette tapes, containing depictions of cunnilingus, fellatio, anal intercourse, excretion of semen from penis to other person(s), masturbation, vaginal/anal insertion of any prosthetic devices, [or] insertion of tongue into anus." (Appendix C at 12). Thus the issuing judge never made any individualized evaluation of vast numbers of materials he ordered seized, but rather indulged in the impermissible assumption that sex equals obscenity.

The police executing this warrant for the seizure of "evidence of the offense of obscenity" might interpret its

mandate in various ways. No matter how interpreted, however, the warrant on its face violates the Constitution.

If the police understood the warrant to require that they seize all copies of all materials depicting one or more of the enumerated sexual acts, it necessarily imposes a blanket prior restraint upon those materials, contravening this Court's numerous decisions rejecting such prior restraints. *See, e.g., Heller v. New York*, 413 U.S. 483, 492 (1973).[7] Alternatively, the police might read this warrant to require them to seize only such materials containing the listed depictions that in their opinion violated the obscenity laws, contravening this Court's equally clear line of decisions that a detached and neutral magistrate must make that initial determination of probable obscenity.

Even if well trained police understood that they were to seize only one copy of unnammed, unspecified materials as evidence of obscenity offenses, the warrant is nonetheless facially invalid. Under the most fastidious interpretation, the warrant still requires the blanket seizure of large numbers of materials that the judge has never reviewed, and with no procedures designed to "focus searchingly" on the targeted materials. Unless read as requiring the seizure of all such materials, it

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[7] Apparently, the police so interpreted the materially identical warrant in *People v. Eagle Books*, 151 Ill. 2d 235, 602 N.E.2d 798 (1992), a recent case in which the Illinois Supreme Court condemned as a prior restraint a seizure of over 700 media items from a bookstore, leaving the shelves bare. The court declined to address the facial validity of such warrants, however, disapproving only the search as executed, rather than the warrant itself.

improperly vests the probable obscenity decision in the police's discretion.

Because this warrant facially violated the First and Fourth Amendments no matter how it might be construed, the Illinois courts have decided this federal question in flagrant disregard of the applicable decisions of this Court, and contrary to numerous decisions of other states' highest courts and federal courts. Under the circumstances, this Court's immediate review of the judgment below is both appropriate and necessary. Given that this sort of overbroad warrant has now been approved for use by law enforcement in Illinois (and sporadically elsewhere, as discussed below), all who would disseminate erotic materials in the affected jurisdictions are now threatened with unconstitutional seizures of materials presumptively protected by the First Amendment.

Not only do Petitioners suffer the continuing injury to their free speech rights by virtue of this invalid seizure and the resulting prosecution; the availability of such abusive general warrants casts a chilling pall over innumerable other speakers and publishers as well. The warrant approved in this case would require police to seize such materials as *Last Tango in Paris* and *Pulp Fiction*. In other cases, police could use this procedure to present one allegedly obscene film as the basis for a warrant that would authorize their seizure of every "R-rated" videotape in the targeted store. In light of the practical implications of this decision for free speech rights generally, resolution of this important federal constitutional question should not be delayed.

I. THIS COURT'S JURISDICTION TO REVIEW THE DECISION BELOW IS BOTH PROPER AND NECESSARY TO PREVENT THE EROSION OF A FUNDAMENTAL FEDERAL CONSTITUTIONAL POLICY PROHIBITING GENERAL WARRANTS FOR THE SEIZURE OF EXPRESSIVE MATERIALS AT THE DISCRETION OF THE POLICE.

This Court may properly assume jurisdiction over the present case because it falls within clear exceptions to the "final judgment rule." As this Court has concluded in many comparable cases, jurisdiction is appropriate here because "a refusal immediately to review the state-court decision might seriously erode federal policy." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-483 (1975). A continuing harm to First Amendment interests has prompted this Court to review numerous prior cases in which "it would be intolerable to leave unanswered . . . an important question of freedom of the press under the First Amendment; an uneasy and unsettled constitutional posture of [the issue] could only further harm the operation of a free press." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247 n. 6. (1974). Similarly, as this Court held in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989), a First Amendment challenge that "calls into question the legitimacy of law enforcement practices of several states, as well as the federal government," will justify

the Court's jurisdiction over a federal issue decided by the state courts, even though the case has not gone to trial.

Petitioners acknowledge that 28 U.S.C. § 1257 generally limits this Court's jurisdiction to review state courts' decisions to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had."[8] Although the final judgment rule as applied in a criminal context normally requires the imposition of a sentence, *Parr v. United States*, 351 U.S. 513, 518 (1956), this Court has recognized numerous exceptions to this rule. This Court has always given this final judgment provision a "practical rather than a technical construction," *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), with the result that it has often reviewed criminal cases in a pretrial posture where pressing constitutional issues are involved.

In *Mills v. Alabama*, 384 U.S. 214 (1966), for example, this Court took jurisdiction of a state criminal prosecution under a statute construed as prohibiting newspapers from publishing political editorials on election day. The Court unanimously held that the Alabama Supreme Court's reinstatement of the prosecution after the trial court had sustained demurrers was a "final judgment," notwithstanding the state's argument that the remand for further proceedings did not end the case. Because important First Amendment rights were at stake, and the defendant's conviction and subsequent appeal would merely

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[8] The Supreme Court of Illinois having refused Petitioners' motion for leave to appeal, the Appellate Court is, for purposes of § 1257, the highest state court in which a decision could be had. *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678 n.1 (1968).

be a "roundabout process" creating an "inexcusable delay" before the defendant could vindicate those rights, the Court had no difficulty concluding that it had jurisdiction. 384 U.S. at 217.

In subsequent cases raising finality questions in a First Amendment context, *see Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247 n. 6. (1974), this Court has relied upon Justice Douglas' concurrence in *Mills*, stressing the policy basis of accepting such cases for review to prevent continuing injury to fundamental constitutional rights:

> "[E]ven had the appellant been unwilling to concede that he has no defense – apart from the constitutional question – to the charges against him, we would be warranted in reviewing this case. That result follows *a fortiori* from our holdings that where important First Amendment rights are jeopardized by a state prosecution which, by its very nature, threatens to deter others from exercising their First Amendment rights, a federal court will take the extraordinary step of enjoining the state prosecution."

384 U.S. at 221. In *Miami Herald*, the Court explicitly adopted this rationale to find sufficiently "final" a pretrial judgment upholding a Florida statute requiring that newspapers afford candidates space to reply to its criticisms.

In the most recent application of this rule favoring jurisdiction where the state-court decision threatens to erode federal policy, the Court held in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989),[9] that review was

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[9] *Fort Wayne Books* was briefed and argued by undersigned counsel.

appropriate in cases raising important issues concerning the First Amendment limitations on prevalent law enforcement practices. The case consolidated with *Fort Wayne Books, Sappenfield v. Indiana,* involved an obscenity prosecution under Indiana's criminal RICO statute. The trial court had sustained a demurrer on First Amendment grounds, but the Indiana Supreme Court reversed and remanded for trial. This Court held that it had jurisdiction:

> "Petitioner's [pretrial] challenge to the constitutionality of the RICO statutes to criminalize patterns of obscenity offenses calls into question the legitimacy of law enforcement practices of several states, as well as the federal government. Resolution of this important issue of the possible limits the First Amendment places on state and federal [law enforcement practices] should not remain in doubt."

489 U.S. at 55-56.

Addressing the *Sappenfield* case in the *Fort Wayne Books* decision, the Court noted more broadly: "Adjudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits application of an exception to the general finality rule." *Id.* at 55.

Thus, this Court has often concluded that it has jurisdiction to review pretrial issues where important First Amendment interests hang in the balance. *Fort Wayne Books* provides a dramatic illustration of this broader principle as well – this Court assumed jurisdiction over the issue of pre-trial RICO seizures based on obscenity allegations, and invalidated a statute the Indiana Supreme Court had definitively upheld against pre-

trial challenges. The issue so clearly qualified as an exception to the final judgment rule that the Court did not further discuss the question of its justiciability.

As *Mills* and this subsequent line of cases indicate, the strongest policy considerations favor judiciability where a case involves prior restraints upon or other serious detriment to the exercise of First Amendment rights. Especially where the injury to the petitioner's free speech rights continues pending final adjudication, or where an erroneous state court decision threatens to chill others in the exercise of First Amendment rights, this Court has been impelled to assume jurisdiction. *See, e.g., National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

In this case, the Illinois Court of Appeals having addressed the issue, and the Illinois Supreme Court having refused to review it, the Illinois courts have finally determined that the search warrant was facially valid. In that sense, the Illinois courts' judgment on the validity of this warrant is a final one. *Cf. Mills; Fort Wayne Books; Village of Skokie.*

Compounding the specific detriment to First Amendment rights that has already occurred in this case is the fact that such onerous search warrants have become a common police and prosecutorial tool in Illinois, at least since the Appellate Court approved their use in *Sequoia Books* in 1986. Since that time, this issue has repeatedly arisen in Illinois obscenity cases. *See, e.g., People v. Eagle Books*, 151 Ill. 2d 235, 602 N.E.2d 798 (1992); *T.S. Books v. Illinois, cert. denied*, ___ U.S. ___, 115 S.Ct. 1822 (1995); *Sequoia Books v. McDonald*, 725 F.2d 1091, 1093 (7th Cir. 1984), *cert. denied*, 469 U.S. 817 (1984). Such overbroad

warrants and seizures have become a prevalent law enforcement practice – not only in Illinois but also in other jurisdictions where police have been emboldened to seek them and the courts have erroneously upheld them (as discussed in greater detail below with regard to the substantive reasons for granting this writ). *See, e.g., In re Search of Kitty's East*, 905 F.2d 1367, 1372-1373 (10th Cir. 1990).

For these reasons, this case is distinguishable from prior cases denying review of issues in superficially similar postures. *Flynt v. Ohio*, 451 U.S. 619 (1981), for example, arose in the context of a state obscenity prosecution, but it did not involve any showing of a programatic enforcement policy in derogation of First Amendment rights, nor any ongoing restraint of those rights. The defendants in *Flynt* challenged their prosecution for obscenity as selective and discriminatory; the trial court ordered the case dismissed on that basis. This Court originally granted review of the Ohio courts' reversal of the trial court's order, but later dismissed the petition for lack of finality in a 5-4 *per curiam* opinion. The four dissenters argued vigorously that the case implicated First Amendment interests sufficient to trigger jurisdiction. The majority concluded, however, that delaying review would not seriously erode federal policy, apparently because of the nature of the claim substantively at issue in *Flynt*, a singular instance of selective prosecution.

It is understandable that the Court held that resolution of the *Flynt* claim could "await final judgment without any adverse effect upon important federal issues." 451 U.S. at 622. By its very nature, a selective prosecution is idiosyncratic and does not immediately tend to threaten the rights of others. Although subjected to a

criminal prosecution, the petitioners there did not suffer any other continuing detriment to their First Amendment rights, such as a prior restraint like the injunction involved in *Skokie* or the seizure of materials involved in this case.

To the extent that the Court in *Flynt* refused to accept pretrial jurisdiction in an obscenity case on grounds of avoiding the piecemeal litigation of other federal issues such as the obscenity *vel non* of the charged materials, it does not represent a preclusive rule to that effect, because in *Fort Wayne Books*, this Court subsequently held to the contrary.

Nor should *Chapman v. California*, 405 U.S. 1020 (1972), govern this case. In *Chapman*, the defendant in an obscenity case sought pretrial review of a California decision reversing the trial court's order suppressing materials seized pursuant to the challenged warrant. The Court denied certiorari over the vigorous dissent of three Justices, whose reasons for urging review have since been relied upon extensively in granting pretrial review of First Amendment issues in state court cases. The dissenters argued that such mass seizures of presumptively protected materials were patently invalid under the rule of *Marcus v. Search Warrants* and its progeny, undermining important First Amendment rights. Again, in *Fort Wayne Books*, the Court court adopted precisely that rationale to take jursidiction and invalidate pretrial seizures in an obscenity case, implicitly disapproving the holding of nonfinality in the *Chapman* situation.

Moreover, unlike Petitioners in this case, the petitioner in *Chapman* apparently did not contend that the overbroad warrant and seizure in his case represented more than an isolated incident, or that it would continue

to the detriment of others' First and Fourth Amendment rights unless this Court granted review. In the present case, Petitioners cite a demonstrable pattern of law enforcement officers seeking and executing such unconstitutional warrants. The prevalence of such unconstitutional warrants distinguishes *Chapman* and brings this case squarely within the Court's rationale in *Fort Wayne Books*, 489 U.S. at 55-56, that the question of First Amendment limits on the law enforcement practices of numerous jurisdictions should not be left in doubt.

II. A WARRANT DIRECTING THE SEIZURE OF UNNAMED MATERIALS WITHOUT PRIOR JUDICIAL SCRUTINY OF THEIR PROBABLE OBSCENITY FACIALLY VIOLATES THE FIRST AND FOURTH AMENDMENTS.

In response to the very abuse of free speech rights which has surfaced again here, this Court has consistently held that the First Amendment requires sensitive search and seizure procedures in cases of alleged obscenity. The seizure of presumptively protected expressive materials threatens to impose a prior restraint, so that warrants for such seizures must issue with "the most scrupulous exactitude" in order to avoid sweeping protected materials into the net. *See Maryland v. Macon*, 472 U.S. 463, 468 (1985), *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 325 (1979), and *Stanford v. Texas*, 379 U.S. 476, 485 (1965).

The common-sense basis for these rules is clear, based on both logic and the nature of the obscenity

offense as a narrow exception to First Amendment protection. Expressive materials enjoy a presumption of constitutional protection, i.e., of non-obscenity. Therefore, since the dawn of modern obscenity law in *Roth v. United States*, this Court has consistently held that any warrant for the seizure of expressive materials on grounds of probable obscenity must not issue unless the magistrate has conducted a review of those materials, "designed to focus searchingly on the question of obscenity." *Marcus v. Search Warrants of Property*, 367 U.S. 717, 732 (1961); *see also New York v. P.J. Video*, 475 U.S. 868, 873 (1986), reaffirming the vitality of the *Marcus* line of decisions.

Under this line of cases, as discussed below, it is intolerable for a warrant to issue without a particularized list of materials the magistrate has individually scrutinized for probable obscenity. Where the magistrate has never reviewed the materials, to seize any and all books and videotapes simply on the basis of a list of depicted sexual activities is to abrogate the presumption of First Amendment protection. Because "sex and obscenity are not synonymous," *Roth*, 354 U.S. at 487, the fact that materials depict sex, without more, cannot establish their probable obscenity. More than ever, since the Video Revolution has vastly popularized explicit sexual materials,[10] the mere presence of a sexual depiction says

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[10] *Adult Video News*, a monthly trade publication of the adult video industry, estimated that in 1994 alone, the adult video industry released over 3000 titles of "hardcore" adult videotapes, with over 500 million rentals of them. *Adult Video News 1995 Adult Entertainment Guide* at 67-69 (AVN Publications, Inc., Los Angeles, CA 1994). Unquestionably, the warrant in this case would direct the seizure of the vast majority of those

nothing about patent offensiveness under prevailing community standards, for example. For that essential reason, this Court's decisions have never approved warrants for the seizure of unnamed materials on the basis that sexual depictions render them probably obscene. Any such warrant is therefore overbroad and creates an unconstitutional prior restraint, because it is virtually guaranteed to result in the seizure of non-obscene materials.

The police might interpret such a warrant as authorizing them to seize only the magazines and videotapes they deem obscene in their discretion (although the literal language of this warrant would seem to command the most all-inclusive seizure). But even in that case, the warrant then fails not only for lack of probable cause and particularity in the above sense, but also because it violates the clear rule that only a "detached and neutral magistrate" may determine probable obscenity, so that "nothing is left to the discretion of the officer executing the warrant." *Stanford v. Texas*, 379 U.S. at 485.

Essentially, the warrant approved in this case short-circuits the requirement that the issuing judge consider particular materials for probable obscenity, rather than sending the police out on a general round-up of erotic materials on the hunch that some of them might ultimately be adjudicated obscene. This practice, now adopted with alarming frequency in several locales, requires this Court's immediate vindication of long-recognized First Amendment rights.

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tapes, a genre *Adult Video News* estimated to have been offered in over one-fourth of video stores nationally. *Id.*

A. The Illinois Appellate Court's Decision Conflicts With This Court's Unequivocal Line of Cases Requiring That Any Seizure of Expressive Materials for Alleged Obscenity Must Abide by Procedural Safeguards Whereby a Magistrate "Focuses Searchingly" on the Question of the Particular Materials' Probable Obscenity, and Orders the Seizure of Those Named Materials.

The decision challenged here flouts the principles this Court has announced in a long line of cases extending from *Marcus v. Search Warrants of Property*, 367 U.S. 717, 732 (1961), through the Court's most recent treatment of obscenity/seizure issues in *New York v. P.J. Video, Inc.*, 475 U.S. 868 (1986), and *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989). In *Stanford v. Texas*, 379 U.S. 476, 485 (1965), this Court emphasized that "the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude" when expressive materials are to be seized on the basis of their content. *Accord: Maryland v. Macon*, 472 U.S. 463, 468 (1985). As the Court reaffirmed, approving this line of authority in *Fort Wayne Books*, 489 U.S. at 62: "[T]his Court has repeatedly held that rigorous procedural safeguards must be employed before expressive materials can be seized as 'obscene.' " In contrast, the warrant in this case, simply listing sexual activities and requiring the seizure of all magazines and videotapes depicting them, represents nothing more than a fishing expedition for obscenity.

This warrant encapsulates all the constitutional vices this Court has sought to preclude in this area, beginning with *Marcus v. Search Warrants of Property*, 367 U.S. 717

(1961). In *Marcus*, this Court held invalid warrant procedures under which police were authorized to seize materials they determined to be obscene. Emphasizing the potency of such general warrants as an instrument of censorship, this Court found the search and seizure fatally defective because it proceeded "without any scrutiny by the judge" of the materials seized as obscene:

> "The warrants gave the broadest discretion to the executing officials; they merely repeated the language of the statute and the complaints, specified no publications, and left to the individualized judgment of . . . the police officers involved the selection of such magazines as in his view constituted 'obscene . . . publications.' "

367 U.S. at 732. Ever since this first case considering the issue, this Court has insisted that there must be a "procedure before seizure designed to focus searchingly on the question of obscenity." *Id.* The Court stressed in *Marcus* that such seizures may be valid only if there is prior judicial evaluation of "a particular named obscene publication." *Id.* at 735. Accordingly, this Court has consistently held that warrant procedures in obscenity cases must focus on particular named materials, that the issuing magistrate must consider the probable obscenity of those particular materials, and that nothing must be left to the discretion of the officers executing the warrant.

Uncontestably, if this warrant requires the seizure of all copies of all materials containing the listed sexual activities, as its literal language does, it is an unconstutional prior restraint of the type this Court has resoundingly disapproved whenever the issue has come before it. *See Marcus; A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964); *Heller v. New York*, 413 U.S. 483, 492 (1973).

Equally clear are the other constitutional rules that this warrant procedure violates even in its most abstemious execution. First, there can be no probable cause to seize materials the judge has never reviewed. The Court most recently addressed this issue in *New York v. P.J. Video, Inc.*, 475 U.S. 868 (1986), holding that a magistrate had probable cause to order the seizure of specific named materials based on affidavits describing them in graphic detail. The Court concluded that the warrant was supported by probable cause where the magistrate was able to "focus searchingly" on five particular films and issued a warrant for the seizure of only those materials, but reaffirmed that under *Marcus* and its progeny broad-scale seizures at the discretion of the police violate the First and Fourth Amendments. *Id.* at 873-877.

In *Lee Art Theatre v. Virginia*, 392 U.S. 636 (1968), by contrast, this Court had held that a police officer's purely conclusory allegations that specific materials to be seized are obscene cannot sustain a warrant. Much less can conclusory allegations that Petitioners' premises contained magazines and videotapes depicting sexual activity, as in the warrant application in this case, establish the probable obscenity of all such materials (see Appendix D at 15-18).

Here, the judge authorized the seizure of unnamed books and videotapes without ever considering the obscenity of any of them, but relied merely upon the conclusory affidavits of police investigators reciting only that various materials on the premises contained "one or more" of the boilerplate list of sexual acts. (See Appendix D at 15-18.) Perhaps most significantly, the judge never reviewed any videotapes at all, before broadly mandating

their seizure. Plainly, the warrant issued without any probable cause regarding the obscenity of these unnamed materials; the magistrate could hardly "focus searchingly on the obscenity" of materials without the benefit of any description or the opportunity to examine them.

As a result, the warrant mandating seizure of all these magazines and videotapes was the product not of a "detached and neutral magistrate," but rather of the police in pursuit of their agenda to seize all – or at least the broadest possible array of – materials depicting sexual activity. Under the warrant procedure challenged here, the judge simply adopted verbatim the police affidavit's near-exhaustive list of sexual activities as establishing probable obscenity. In effect, it was the police, and not the magistrate, who defined the scope of the search.

This warrant thus suffers from the same lack of a "detached and neutral magistrate" to determine probable obscenity as did the seizure in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979). In *Lo-Ji*, the Court invalidated a seizure of allegedly obscene materials where the magistrate accompanied police on the search, resulting in the seizure of numerous titles he determined to be obscene in the course of leading the search party. The magistrate was not "neutral and detached," this Court held, where he became a member of the search party and thus acted as an adjunct law enforcement officer. Likewise, the magistrate in this case did not make "neutral and detached" judgments regarding probable obscenity, but rather simply "rubber-stamped" the law enforcement agenda of seizing the broadest possible array of sexual depictions, as ostensibly permitted under erroneous Illinois decisions.

Second, a warrant for the seizure of allegedly obscene materials must specify those materials. Otherwise, the warrant is a general one in violation of the Fourth Amendment, and imposes an overbroad prior restraint on materials which a "detached and neutral magistrate" has not examined for obscenity. This Court has never approved such a warrant for the generic seizure of unnamed materials; rather it has routinely struck down warrants of that character. *See Marcus; A Quantity of Copies of Books v. Kansas; Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 325 (1979).

Finally, if this warrant does not require the seizure of *all* materials depicting the listed sexual acts, then it necessarily leaves to the unbridled discretion of the police the determination of probable obscenity at the time of the seizure. This Court has likewise held such police discretion *per se* unconstitutional in every case beginning with *Marcus*. Citing *Marcus* in *Stanford v. Texas*, 379 U.S. at 485, this Court noted the "constitutional impossibility of leaving the protection of [First Amendment] freedoms to the whim of the officers charged with executing the warrant," and held unconstitutionally general a warrant broadly authorizing the seizure of materials evidencing Communist Party activity.

In *Lo-Ji Sales, Inc. v. New York*, this Court invalidated a materially identical warrant and seizure on grounds that the police were afforded undue discretion to seize materials they believed to be obscene. Much as in this case, the police in *Lo-Ji Sales* had obtained a warrant after they presented two films to the magistrate, who then authorized them to seize "similar" materials. In addition to the magistrate's loss of judicial neutrality by joining the search party, this Court concluded that the warrant's

failure to list particular materials rendered it invalid. 442 U.S. at 325. The unconstitutional discretion to seize whatever "similar" materials the police deem obscene in *Lo-Ji Sales* is indistiguishable from this warrant's mandate that police seize any of the listed depictions they deem obscene.

Under these cases, the warrant challenged here is either overbroad in mandating the seizure of all materials including the listed depictions, or it affords discretion to the police and thus violates the First and Fourth Amendment rule that warrants must describe the items to be seized with such particularity that "nothing is left to the discretion of the officer executing the warrant." *Stanford v. Texas*, 379 U.S. at 485, quoting *Marron v. United States*, 275 U.S. 192, 196 (1927).

Either way, the warrant here violates virtually every rule this Court has scrupulously imposed on such seizures under the First and Fourth Amendments. As Chief Justice Burger observed for the unanimous Court in *Lo-Ji Sales*, 442 U.S. at 329: "Our society is better able to tolerate the admittedly pornographic business of petitioner than a return to the general warrant era; violations of law must be dealt with within the framework of constitutional guarantees."

B. The Decision Below Also Conflicts With Other State Supreme Courts' and Federal Courts' Decisions Invalidating Such Overbroad Warrants.

The Illinois courts' decision in this case (and others raising the same issue) conflicts not only with this Court's cases defining procedures the First Amendment requires for such warrants and seizures, but also with

numerous federal and state supreme court decisions more faithful to constitutional authority. As a result, fundamental free speech rights are secure in some jurisdictions, while in others the police are routinely authorized to rifle through inventories of books, magazines, films and videotapes, and seize materials at will.

In contrast to these decisions of the Illinois courts, a number of courts have insisted on procedures consistent with this Court's interpretation of the First Amendment. In *State v. Hall*, 293 S.C. 331, 360 S.E.2d 323 (1987), the Supreme Court of South Carolina ordered the return of videotapes seized pursuant to a warrant which did not identify them "by name, title, or fair description" but rather called for the seizure of "additional and like suspect material," with reference to other adult videotapes submitted to the judge. 360 S.E.2d at 324.

And on facts materially identical to the warrant at issue here, in *Dobbins v. State*, 262 Ga. 161, 415 S.E.2d 168, 171 (1992), the Supreme Court of Georgia ordered the suppression of adult videotapes seized pursuant to a warrant authorizing the seizure of "materials of a pornographic nature . . . which are contrary to the laws of the State of Georgia." The court held that the "warrant's description was so open-ended that [it] was a general warrant in violation of both the U.S. and Georgia Constitutions. The warrant left the determination of what items are likely to be 'of a pornographic nature' entirely to the discretion of the officers executing the warrant," contravening the rule of *Lo-Ji Sales*. 415 S.E.2d at 171-172.

The Illinois courts' resolution of this issue is squarely at odds with these decisions of the Georgia and South Carolina Supreme Courts. It likewise conflicts with decisions of the federal courts on this issue. In *United States v.*

Hale, 784 F.2d 1465, 1469 (9th Cir. 1986), the Ninth Circuit held inadmissible a magazine seized under a warrant authorizing the seizure of unnammed "obscene, lewd, lascivious or indecent" material. "Blanket clauses that do not refer to specific items . . . are not proper bases for constitutional searches and seizures," the court held, citing a number of this Court's decisions. Under this rationale, the Ninth Circuit clearly would invalidate the warrant challenged here. *See also United States v. Tupler*, 564 F.2d 1294 (9th Cir. 1977) (invalidating search warrant to seize films based on the sexual depictions on their boxes); *United States v. Guarino*, 729 F.2d 864 (1st Cir. 1984) (invalidating warrant for seizure of "obscene materials"). Although not addressing precisely the same search warrant language, these decisions of the First and Ninth Circuits are clearly at loggerheads with the Seventh Circuit's decision in *Sequoia Books v. McDonald*, 725 F.2d 1091 (7th Cir. 1984), creating a split of authority among the circuits as well.

Because the Illinois courts' decision of this issue in this and several other cases conflicts with both this Court's decisions and that of numerous other courts, this Court's immediate review of this case is highly appropriate.

C. This Court's Immediate Review of This Issue Is Necessary to Prevent The Continuing Erosion of Federal Constitutional Rights in the Jurisdictions Where Such Warrants Have Been Upheld.

For several years now, as evidenced by this and numerous other cases raising this issue in Illinois and elsewhere – this type of unconstitutional warrant has become increasingly common in obscenity cases. The

reported cases erroneously upholding these warrants indicate that since the Illinois courts' approval of this type of warrant, it has become a routine law enforcement practice, in derogation of important constitutional rights.

This line of Illinois cases began with *Sequoia Books v. McDonald*, 725 F.2d 1091 (7th Cir. 1984), *cert. denied*, 469 U.S. 817 (1984), when the plaintiffs brought an action under 42 U.S.C. § 1983, challenging the precise type of warrant involved in this case, mandating the seizure of unnamed materials not previously reviewed by the issuing magistrate. The warrant simply listed virtually every type of sexual activity and authorized the seizure of any such sexual depictions as probable obscenity. Pursuant to this warrant, police had seized not only the few magazines they had described in their affidavit, but *any* materials depicting the near-exhaustive list of sexual activities, removing "several hundred magazines, movies and videotapes from the store." 725 F.2d at 1093. Disregarding the clear holdings and import of this Court's decisions discussed above, the court upheld the denial of injunctive relief. *Id.* at 1094.

Two years later the same company was litigating this issue following an obscenity conviction based on the unconstitutionally-seized materials. In *People v. Sequoia Books, Inc.*, 145 Ill. App. 3d 1054, 495 N.E.2d 1292 (2nd Dist. 1986), the court upheld precisely the same sort of warrant and seizure challenged in this case. Pursuant to the warrant merely listing sexual depictions subject to seizure, the police had entered the bookstore and seized over 375 magazines.

Nor do the *Sequoia Books* cases represent an isolated instance: several other Illinois cases also witness the chilling abusiveness of seizures under this type of search warrant. In *People v. Eagle Books*, 151 Ill. 2d 235, 602 N.E.2d 798 (1992), the Illinois Supreme Court held that a search conducted under a virtually identical warrant was an unconstitutional general search, where police seized over 700 magazines. The police testified that they simply seized "any magazine with any kind of sexual conduct in it. . . . [T]he magazine racks, which were full when the officers entered, appeared empty when they left." 602 N.E.2d at 800. Although disapproving the search itself, the court declined to hold the warrant facially invalid. *Id.* at 803.[11]

Thus, this sort of sweeping seizure of materials at the discretion of the police, precisely the abuse of First and Fourth Amendment rights this Court has sought to prevent in its long line of decisions discussed above, has repeatedly come before the Illinois courts, which have yet to hold this general search warrant unconstitutional. As the inevitable result, of course, this list of sexual activities has become boilerplate language in affidavits and search

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[11] In *People v. Page Books*, 235 Ill. App. 3d 765, 601 N.E.2d 273, 275 (2nd Dist. 1992), the defendant did not raise the issue of the seach warrant because of that court's prior decision of the point in *Sequoia Books*, but a similar warrant had resulted in the seizure of 31 titles; 25 magazines were combined into a single obscenity count. Petitioners are aware of at least two other Illinois obscenity cases resulting in no published opinions, *see T.S. Books, Inc. v. Illinois, cert. denied*, ___ U.S. ___, 115 S.Ct. 1822 (1995), and *People v. Champaign Books, Inc.* (Champaign, Illinois County Court No. 90-CM-657, verdict of acquittal, 1990), in each of which the police employed warrants of this sort to seize hundreds of titles.

warrants. It is now common practice in Illinois for the issuing magistrate simply to read an affidavit relating that there are erotic materials on the targeted premises (See Appendix D at 15-18), and on that basis to abdicate the constitutional responsibility to make particularized findings of probable obscenity.

Sporadically, other jurisdictions have also upheld boilerplate affidavits and warrants, resulting in dragnet seizures of presumptively protected materials. The Tenth Circuit recently approved a similar, although somewhat narrower warrant authorizing the seizure of videotapes with "similar" covers, cost, and subject matter. *In re Search of Kitty's East*, 905 F.2d 1367, 1372-1373 (10th Cir. 1990). *See also United States v. Espinoza*, 641 F.2d 153, 164-165 (4th Cir. 1981) (upholding warrant authorizing seizure of other "obscene magazines" in addition to a particularly named film).

Such massive, virtually unfettered seizures are indefensible under this Court's decisions, and yet have now become a common weapon in the arsenal of officials who would harrass and intimidate those engaged in constitutionally protected erotic speech. For the past decade, the use of these abusive warrants has steadily escalated, at least in Illinois. This Court's review and disapproval of such unconstitutionally broad warrants is long overdue; a writ of certiorari should issue in this case before one more bookstore or videostore falls prey to this violation of fundamental First and Fourth Amendment rights.

CONCLUSION

For all the foregoing reasons, Petitioners repectfully urge this Court to grant a writ of certiorari and to reverse the decision below.

Respectfully submitted,

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APPENDIX A

Unpublished order and opinion of the Appellate Court of Illinois, Second District, in *People v. Zebulon Enterprises, Inc.* (December 22, 1994)

No. 2-93-0837 and
2-93-0844 (Consolidated)

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant v. ZEBULON ENTERPRISES, INC., and LARRY GANT, Defendants-Appellees.	Appeal from the Circuit Court of Du Page County. No. 91-CF-2892 91-CM-6876 Honorable Edward W. Kowal Judge, Presiding.

RULE 23 ORDER

(Filed Dec. 22, 1994)

Defendants, Zebulon Enterprises, Inc., and Larry Gant were each indicted on two counts of obscenity. (Ill. Rev. Stat. 1991, ch. 38, par. 11-20(a)(1), (d) (now 720 ILCS 5/11-20(a)(1), (d) (West 1992)). Zebulon Enterprises owned an adult bookstore in Roselle, Illinois. Defendant Gant worked as a salesclerk at said bookstore. Defendants filed a motion to suppress certain evidence taken in the search of Zebulon's Roselle bookstore. The trial court granted defendants' motion to suppress and ordered evidence seized pursuant to a search warrant to be suppressed. The State filed the requisite certificate of impairment and a timely notice of appeal.

The sole issue on appeal is whether the trial court erred in granting the subject motion to suppress.

There was no evidentiary hearing related to this issue. Therefore, we must glean the relevant facts from the complaint for a search warrant. Lori J. Chassee, a criminal investigator with the Du Page County State's Attorney's Office, was assigned to investigate possible violation of obscenity statutes at Zebulon's Roselle bookstore. On September 19, 1991, she directed investigative assistant Phil Anderson to enter the book store. Anderson observed a number of magazines depicting sexual acts for sale on the store's shelves. He went into the area containing the bookstore's video booths and viewed a number of sexually explicit video tapes. Anderson returned to the main area of the store where he selected a magazine entitled "Cum Again" for $23.95. Thereupon, Anderson left Zebulon and gave the magazine to Chassee.

On September 30, 1991, and October 16, 1991, Chassee directed investigator Robert Holguin to enter the bookstore. On both occasions, Holguin observed magazines depicting sexual acts for sale at the bookstore. Each time he viewed sexually explicit films in one of the bookstore's video booths. Both times, he purchased a magazine, "Anal No. 12" and "Color Climax #139," respectively. Each magazine was given to Chassee for evidentiary purposes.

The complaint for search warrant also stated that on November 15, 1989, a search warrant was executed at the subject bookstore. The salesclerk on duty at that time was charged with and convicted of obscenity. Pursuant to this

search, Zebulon Enterprises was also charged with and convicted of obscenity.

On October 16, 1991, Chassee submitted her complaint for a search warrant to the trial court with the three above-cited magazines attached. The trial court authorized the issuance of a search warrant for the subject bookstore. The search warrant authorized the seizure of:

> "Magazines, video cassette tapes, containing depictions of cunnilingus, fellatio, anal intercourse, excretion of semen from penis to other person(s), masturbation, vaginal/anal insertion of any prosthetic devices, insertion of tongue into anus."

On October 17, 1991, the search warrant was executed. Investigators seized four videotapes and 25 magazines. Subsequently, defendants were each indicted on two obscenity counts.

At the hearing on the motion to suppress, defendants argued, *inter alia*, that *People v. Sequoia* (1986), 145 Ill. App. 3d 1054, was factually distinguishable from the instant case and, therefore, not controlling. Defendants further argued that *People v. Eagle Books, Inc.* (1992), 151 Ill. 2d 235, in effect, overruled *Sequoia Books*. The State maintained that *Sequoia Books* had not been overruled by *Eagle Books* and that *Sequoia Books* was controlling.

After hearing the parties' arguments on the subject motion to suppress, the trial court granted defendants' motion. The trial court stated:

> "It should be noted at this time that the complaint for search warrant closely follows the procedure used in the *Sequoia Books* case * * * .

The complaints recite that investigators entered into an establishment, an adult bookstore, made certain observations and then, by affidavit, had a warrant for search and seizure issued by a Judge.

The warrant issued is for the search for evidence of the offense of obscenity and to seize any magazines, tapes, so forth, containing depictions of various sexual acts and records of ownership of the described business.

It should be further noted that in the case of People versus Eagle Books, decided by the Illinois Supreme Court on October 15th, 1992, there was also wording similar to the warrant in this case. Strangely though, nothing was mentioned of the Sequoia cases in the *Eagle* case.

The Court finds that the direction of the Eagle case is to consider a warrant as general when it allows an officer to search and seize whatever the officer determines to be obscene.

Obviously, there must be specificity in the warrant, and when it is lacking, the warrant is designated as general, and many cases have set forth the law on that particular issue.

The determination of obscenity was, therefore, left to the executing officers in this case.

The motion to suppress those items seized pursuant to the search warrant; that is, matters which are pertaining to obscenity, are suppressed, and that applies both to Gant and Zebulon." (Emphasis added.)

On appeal, the State makes the following argument. The trial court erred in granting the defendants' motion to suppress the evidence seized. Under the rationale of

People v. Sequoia Books, Inc. (1986), 145 Ill. App. 3d 1054, and related cases, the search warrant in this case, which ordered a search for materials depicting particular sexual acts, was sufficiently specific so as to avoid it being deemed a general warrant. Contrary to the trial court's view, *People v. Eagle Books, Inc.* (1992), 151 Ill. 2d 235, does not affect the continuing vitality of Sequoia Books, since the cases deal with entirely different legal issues.

Defendants argue, *inter alia,* that *Eagle Books* has profoundly impacted the law with respect to search warrants for allegedly obscene materials and that *Eagle Books* overruled, albeit *sub silentio, Sequoia Books.* All other arguments of the defendants are not on point and will not be considered in the disposition of this appeal.

Initially, we note that a trial court's ruling on a motion to suppress evidence will not be disturbed on review unless it is manifestly erroneous. *People v. Westbrook* (1992), 262 Ill. App. 3d 836, 847.

After carefully reviewing the above-cited statement of the trial court, the parties' arguments, as well as *Sequoia Books* and *Eagle Books,* we conclude that the trial court erroneously determined that *Eagle Books* had, in effect, overruled *Sequoia Books.* In *Sequoia Books,* investigators visited the defendant's bookstore and looked through a number of magazines displayed therein. Attached to the complaint for a search warrant were two affidavits. Investigator Robert Wunch stated that he had been in the subject bookstore and purchased two magazines, each of which depicted more than one of the sexual acts described in the proposed search warrant. The trial court received the two magazines purchased by Wunch

prior to issuing the warrant. Deputy Sheriff Timothy McCann's affidavit stated that numerous criminal charges had previously been filed under the obscenity statute against defendant's bookstore.

Subsequently, the trial court in *Sequoia Books* issued a search warrant of the subject bookstore to search for evidence of obscenity violations and to seize any "[m]agazines containing depictions or portions thereof the following: Cunnilingus, fellatio, anal intercourse, excretion of semen from the penis onto other person [*sic*], masturbation, vaginal or anal insertion of prosthetic devices, insertion of tongue into anus." We note that this language is virtually the same as the relevant language in the search warrant of the instant appeal. During the subsequent search, police seized over 375 magazines.

The *Sequoia Books* defendant argued *inter alia* that the search warrant did not sufficiently particularize the items to be seized and should have been quashed as a general warrant. Defendant further contended that the search warrant allowed the executing officers to determine what magazines were obscene in direct violation of *Marcus v. Search Warrants of Property* (1961), 367 U.S. 717, 6 L. Ed. 2d 1127, 81 S. Ct. 1708, and its progeny.

In rejecting these arguments, the *Sequoia Books* court wrote:

> "The purpose of the search in this case was not to suppress materials but was to obtain evidence of an alleged criminal offense.
>
> * * *
>
> * * * . Underlying the reasoning of the decisions involving the requirement that the

> items to be seized must be particularly described is the prevention of general, exploratory searches by executing officials with unfettered discretion. [Citations.] The language of the search warrant here may initially appear to be general; however, when compared to the 'general' warrants of the past, we conclude that the conduct intended to be prevented, that is the *ad hoc* determinations of obscenity by law-enforcement personnel suppressing first amendment rights, is accomplished by this search warrant because it is a search for evidence and a seizure of items depicting certain explicit sexual conduct which, by prior judicial determination, indicates a fair probability that they meet the three-prong obscenity test. Under the facts presented in this case, we find the search warrant constitutionally sufficient." 145 Ill. App. 3d at 1062-63.

Thus, there is no doubt that, under *Sequoia Books*, the subject search warrant, the language of which virtually follows that of the *Sequoia Books* search warrant, is constitutionally sufficient.

In contrast, a review of *Eagle Books* demonstrates its inapplicability to the instant appeal. The defendant in *Eagle Books* argued before this court that the search warrant was general on its face and therefore unconstitutional. (No. 2-89-1018 Unpublished Rule 23 Order) The relevant language of the *Eagle Books* search warrant was the same as that found in the search warrants in *Sequoia Books* and in the instant case. This court rejected defendant's argument, relying upon *Sequoia Books*.

Before our supreme court, the *Eagle Books* defendant once again contended *inter alia* that the search warrant

was general on its face. The supreme court did not address this issue. It specifically stated:

> "We disagree with that part of the appellate court order *upholding the search* and find that it was constitutionally improper because it was a *general search* which acted as a prior restraint on the dissemination of materials arguably within first amendment protection. For this reason, we conclude that the evidence used to convict defendant was improperly obtained and should have been suppressed from trial. *Therefore, we do not reach, and intimate no view upon, defendant's contention on the other issues raised relating to the warrant.*" (Emphasis added.) 151 Ill. 2d at 247.

Thus, the trial court's conclusion that *Eagle Books* dealt with the general nature of a search warrant is erroneous.

Instead, the *Eagle Books* court addressed the issue of whether the search was a general one. In *Eagle Books*, the police confiscated 700 magazines from the bookstore and a van that was making a delivery to the bookstore at the time of the search. One officer testified that the magazine racks were full when the police entered the bookstore. Following the seizure of magazines, the officer stated that those same racks "looked empty." The *Eagle Books* court stated in relevant part:

> "[T]he seizure of over 700 magazines raises concerns that the search operated as a prior restraint of the dissemination of the materials rather than as means to obtain evidence of criminal activity, especially where, as here, the judicial determination of the obscenity issue in an adversarial hearing was had over two years later.

* * *

* * *. Clearly, leaving the bookstore 'empty' of its magazines went beyond seizing and retaining publications for evidentiary purposes but instead was a confiscation aimed at removing publications, presumptively within first amendment protection, from circulation completely. [Citations.] * * *.

Equally problematic is the subsequent handling of the magazines seized from the store. As noted above, the more than 550 magazines in these boxes were removed from circulation and kept in the sole possession of the police, in addition to the 155 magazines removed from the store's shelves. Clearly, the effect of this type of seizure was to suppress as a prior restraint the materials sold in the store.

* * *

From our review of the record, it is patently obvious that after seizing the magazines taken from the store's premises, the police culled through the materials, deciding which could be used as the basis of the complaint against defendant. Various magazines from both sets of boxes, those removed from the store's premises and those removed from the van, were than combined and introduced, over defendant's objection, at trial. To allow the police to 'voluntarily return' items seized in the search in an effort to save the entire search has no basis in the Supreme Court's opinions or in this court's and we decline to create new inroads in this area, particularly where none are merited." 151 Ill. 2d at 252-55.

In finding that all materials seized must be suppressed, the *Eagle Book* court relied substantially on *People v. Kimmel* (1966), 34 Ill. 2d 257.

Clearly, *Eagle Books* is concerned with general searches that result in the seizure of large numbers of allegedly obscene materials. This concern does not apply to the instant appeal, where the primary issue was the general nature of the subject search warrant.

In conclusion, we find that the trial court erred in determining that *Eagle Books* controlled this case. The issue here, as framed by the trial court, was the general nature of the subject search warrant. This was an issue that the *Eagle Books* court specifically declined to address. *Sequoia Books* controls the issue before this court. We rely on *Sequoia Books* to find that this search warrant was sufficiently constitutional. Accordingly, we find that the trial court's granting of the defendants' motion to suppress the evidence seized during the subject search was manifestly erroneous. We remand this case to the circuit court for proceedings consistent with this opinion.

Reversed and remanded.

RATHJE, J., with McLAREN and COLWELL, JJ., concurring.

APPENDIX B

Order of the Supreme Court of Illinois denying leave to appeal (April 5, 1995)

ILLINOIS SUPREME COURT
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Weston, Sarno, Garrou & DeWitt
433 North Camden Drive, S#900
Beverly Hille [sic], CA 90210

No. 78524 – People State of Illinois, respondent, v. Zebulon Enterprises, Inc., et al., petitioners. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 27, 1995.

APPENDIX C

Search Warrant

State of Illinois
County of Du Page

No. S6259

THE EIGHTEENTH JUDICIAL CIRCUIT COURT
Du Page County, Wheaton, Illinois

SEARCH WARRANT

THE PEOPLE OF THE STATE OF ILLINOIS TO ALL PEACE OFFICERS IN THE STATE,

ON THIS DAY, LORI J. CHASSEE, Complainant, has subscribed and sworn to a Complaint for a Search Warrant before me. Upon examination of the Complaint, I find that it states facts sufficient to show probable cause and I therefore command that:

the person of _____

and/or the premises of A building known as Zebulon Book Store, 24 W 777 Lake Street, Roselle, DuPage County, Illinois, d/b/a Zebulon Enterprises be searched and the following instruments, articles and things which have been used in the commission of, or which constitute evidence of the offense of Obscenity; Illinois Revised Statutes Ch/ 38, Sec. 11-20(a)(1) be seized therefrom:

> Magazines, video cassette tapes, containing depictions of cunnilingus, fellatio, anal intercourse, excretion of semen from penis to other person(s), masturbation, vaginal/anal insertion of any prosthetic devices, insertion of tongue into anus; any and all records which constitute inditia of ownership of the above described business including but not limited to corporate minutes, payroll records, bank records, sales receipts, invoices, any and all instrumentalities used in furtherance of the above described offenses.

I further command that a return of anything so seized shall be made without unnecessary delay before me, or before any Court of competent jurisdiction.

Time and Date of issuance 10/16/91 5:20 P.M.

John T. Elsner
Judge Associate Judge

No. S 6259

SEARCH WARRANT

Person _____

Premises A building known as Zebulon Book Store, 24 W 777 Lake Street, Roselle, DuPage County, Illinois, d/b/a Zebulon Enterprises

I executed this Warrant by serving the above named Person and/or Premises, this 17th day of October, 1991 at 1106 AM.

/s/ Rita A Hayes
Peace Officer

* * *

APPENDIX D

Complaint for Search Warrant

State of Illinois
County of Du Page

No S6259

THE EIGHTEENTH JUDICIAL CIRCUIT COURT
Du Page County, Wheaton, Illinois

COMPLAINT FOR SEARCH WARRANT

Now appears LORI J. CHASSEE, Complainant, before the undersigned Judge of the Eighteenth Judicial Circuit, and requests the issuance of a Search Warrant to search the person of

_____

and/or the premises of A building known as Zebulon Book Store, 24 W 777 Lake Street, Roselle, DuPage County, Illinois, d/b/a Zebulon Enterprises and therefrom to seize the following instruments, articles and things which have been used in the commission of, or which constitute evidence of, the offense of Obscenity in violation of Illinois Revised Statutes, Chapter 38, Section 11-20(a)(1). (See Exhibit A attached hereto)

Complainant states that he has probable cause to believe, based on the following facts, that the above listed things to be seized are now located upon the person and/or premises set forth above.

That I, Lori J. Chassee, am a Criminal Investigator employed by the DuPage County State's Attorney's Office. I have been so employed for approximately twelve and one-half years. In conjunction with my duties, I have been assigned to the investigation of possible violations of the obscenity statutes occurring at the building known as Zebulon Adult Books, 24 W 777 Lake St., Roselle, DuPage County, Illinois.

On September 19, 1991, at my direction, Inv. Asst. Phil Anderson of the DuPage County States Attorney's Office, entered a building known as Zebulon Adult Book Store, 24 W 777 Lake St., Roselle, DuPage County, Illinois. After exiting Zebulon Books, Inv. Asst. Anderson advised me of the following: Inv. Asst. Anderson observed a main room containing a sales counter, glass display cases containing video-tape cassettes, and multiple free standing magazine racks. Inv. Asst. Anderson observed these racks to contain colored magazines in plastic wrappers, the covers of which depicted either nude or partially nude male and/or female individuals engaged in one or more of the following acts: cunnilingus, fellatio, anal intercourse, excretion of semen from penis to other person(s), masturbation, vaginal/anal insertion of prosthetic devices, insertion of tongue into anus. Inv. Asst. Anderson advised me that the video cassette tapes and the magazines were available for sale to the public.

Inv. Asst. Anderson observed several doorways leading out of the main room, at least two of which lead to areas containing automated video viewing booths. Inv. Asst. Anderson obtained quarters from the clerk behind the counter and entered one of the viewing booths. Inv. Asst. Anderson observed the booth to contain a coin operated television monitor with a channel selection button, and a raised bench area. Inv. Anderson deposited a quarter into the coin slot and the monitor displayed a male and female couple engaged in sexual intercourse. After depositing additional coins, Inv. Asst. Anderson used the channel selection button and observed that several different tapes were available for viewing. Anderson viewed a representative sample of each of the available

channels and observed the tapes to depict sexual acts between males and females, males and males, and groups of individuals including one or more of the following acts: cunnilingus, fellatio, anal intercourse, excretion of semen from penis to other person(s), masturbation, vaginal/anal insertion of prosthetic devices, insertion of tongue into anus.

Inv. Asst. Anderson returned to the main area of the store where he selected a magazine entitled "Cum Again" which he took to the sales counter and paid the store clerk $23.95 U.S.C. for the purchase of the magazine. Anderson returned this magazine to me and I placed it into evidence.

I have examined the magazine purchased by Inv. Asst. Anderson entitled "Cum Again" and observed it to contain depictions one or more of the following acts: cunnilingus, fellatio, anal intercourse, excretion of semen from penis to other person(s), masturbation, vaginal/anal insertion of prosthetic devices, insertion of tongue into anus.

On September 30, 1991, at my direction, Inv. Robert Holguin of the DuPage County States Attorney's Office, entered a building known as Zebulon Adult Book Store, 24 W 777 Lake St., Roselle, DuPage County, Illinois. After exiting Zebulon Books, Inv. Holguin advised me of the following: Inv. Holguin observed a main room containing a sales counter, glass display cases containing video-tape cassettes, and multiple free standing magazine racks. Inv. Holguin observed these racks to contain colored magazines in plastic wrappers, the covers of which depicted

either nude or partially nude male and/or female individuals engaged in one or more of the following acts: cunnilingus, fellatio, anal intercourse, excretion of semen from penis to other person(s), masturbation, vaginal/anal insertion of prosthetic devices, insertion of tongue into anus. Inv. Holguin advised me that the video cassette tapes and the magazines were available for sale to the public.

Inv. Holguin observed several doorways leading out of the main room, at least three of which lead to areas containing automated video viewing booths. Inv. Holguin obtained quarters from the clerk behind the counter and entered one of the viewing booths. Inv. Holguin observed the booths to be in the same condition as previously reported by Inv. Asst. Anderson.

Inv. Holguin deposited a quarter into the coin slot and the monitor displayed a [sic] two males engaged in an act of fellatio. After depositing additional coins, Inv. Holguin used the channel selection button and observed that fifteen different tapes were available for viewing. Holguin viewed a representative sample of each of the available channels and observed the tapes to depict sexual acts between males and females, males and males, and groups of individuals including one or more of the following acts: cunnilingus, fellatio, anal intercourse, excretion of semen from penis to other person(s), masturbation, vaginal/anal insertion of prosthetic devices, insertion of tongue into anus. Inv. Holguin repeated this viewing process in another viewing area with the same results. A third viewing area was closed to the public on this date.

Inv. Holguin returned to the main area of the store where he selected a magazine entitled "Anal No. 12" which he took to the sales counter where he paid the store clerk $23.35 U.S.C. for the purchase of the magazine. Holguin returned this magazine to me and I placed it into evidence.

I have examined the magazine purchased by Inv. Holguin entitled "Anal No. 12" and observed it to contain depictions one or more of the following acts: cunnilingus, fellatio, anal intercourse, excretion of semen from penis to other person(s), masturbation, vaginal/anal insertion of prosthetic devices, insertion of tongue into anus.

On October 16, 1991, at my direction, Inv. Robert Holguin returned to the premises known as Zebulon Adult Book Store, 24 W 777 Lake St., Roselle, DuPage County, Illinois. After exiting Zebulon Books, Inv. Holguin advised me of the following: Inv. Holguin observed the premises and the merchandise available for sale to be in the same condition as on his previous visit.

Inv. Holguin viewed tapes available in the booths and observed them again to contain depictions of sexual acts between males and females, males and males, and groups of individuals including one or more of the following acts: cunnilingus, fellatio, anal intercourse, excretion of semen from penis to other person(s), masturbation, vaginal/anal insertion of prosthetic devices, insertion of tongue into anus. Inv. Holguin observed that the previously closed viewing area was now open to the public.

Inv. Holguin returned to the main area of the store where he selected a magazine entitled "Color Climax

#139" which he took to the sales counter where he paid the store clerk $ 22.50 U.S.C. for the purchase of the magazine. Holguin returned this magazine to me and I placed it into evidence.

I have examined the magazine purchased by Inv. Holguin entitled "Color Climax #139" and observed it to contain depictions one or more of the following acts: cunnilingus, fellatio, anal intercourse, excretion of semen from penis to other person(s), masturbation, vaginal/anal insertion of prosthetic devices, insertion of tongue into anus.

On November 15, 1989, a Search Warrant was executed on the premises known as Zebulon Adult Books. The clerk on duty at the time were charged with Obscenity. The defendant was found guilty of these charges. Arising out of that same search, Zebulon Enterprises, Inc. was also charged and convicted of the offense of Obscenity.

I have presented the three above described magazines purchased at Zebulon Adult Books to this court and they are incorporated herein by reference.

I believe that the above facts constitute probable cause to believe that the offense of Obscenity is being committed and that obscene magazines and video tapes are being provided and offered for sale and/or viewing at the premises known as Zebulon Adult Books, 24 W 777 Lake St., Roselle, DuPage County, Illinois.

_____

Complainant

SUBSCRIBED and SWORN to before me on ___, 1991.

_____

Judge or Associate Judge